IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-934

GERALDINE L. FLANAGAN, individually and as heir of Claire Lux, deceased, and on behalf of the heirs and next of kin of the passengers who died in the DC-10 Paris air crash of March 3, 1974, et al.,

Petitioner,

v.

McDONNELL DOUGLAS CORPORATION and the UNITED STATES OF AMERICA,

Respondents.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

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Statement

On January 2, 1976 the Petitioner filed a Petition in this court praying that a writ of certiorari issue to review the writ of mandamus and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 28, 1975. This Supplemental Petition is filed to advise the court of matters unknown and unavailable to us at the time of the initial filing in accordance with Rule 24(5) of the Rules of the Supreme Court.

The "Questions Presented" as set forth in the Petition for a Writ of Certiorari remain unchanged.

Further Reason for Granting the Writ

***Petition of Gabel*, 350 F.Supp. 624 (C.D.Ca. 1972) referred to by the court below cannot constitute evidence of "repeated errors" to justify issuing a writ of mandamus. Gabel is now on appeal and has yet to be reviewed on its own record by any panel of judges of the Court of Appeals below.**

In its May 28, 1975 opinion and order [A6] the court below said:

> "We are also aware that the District Court has reached an identical decision in a prior case. *Petition of Gabel,* 350 F.Supp. 624, 630 (C.D.Ca.1972). Repeated errors of this magnitude in applying the Federal Rules of Civil Procedure may be corrected by mandamus."

Information obtained concerning the status of *Gabel* on appeal makes this condemnation of the district court below wholly unjustified. No appellate court has to date reviewed the record or heard argument in *Gabel;* consequently there has been no consideration of the class action determination therein in a manner consistent with the fairness and restraint expected in the appellate review process.

On February 23, 1972 Hon. Peirson M. Hall declared in *Gabel* that a class action could be maintained under F.R.Civ.P. Rule 23(a), 23(b)(1)(A) and (B) and (b)(2) to determine the liability of defendants for the deaths of 50 persons in a mid-air collision over Duarte, California on June 6, 1971. Individual actions brought previously had been consolidated for discovery purposes by the Judicial Panel for Multidistrict Litigation (MDL #106) in the Central District of California and were assigned to Judge Hall.

We have learned that between September 13, 1974 and July 2, 1975 twenty-five plaintiffs in *Gabel* filed appeals

in the Court of Appeals for the Ninth Circuit to challenge the District Court's award of fees to class counsel and underlying class action determination of February 23, 1972. [The appeals have been consolidated under docket #74-3283.] On September 15, 1975 the appellees in *Gabel* filed combined briefs stating their position.

As of January 13, 1976 no subsequent entries have been docketed in *Gabel.* The appeal has not been assigned to a panel for consideration nor is there any indication when that will occur and when oral argument will be set.

Obviously on August 6, 1974 when the class action order in *Flanagan* [A11] was signed *Gabel* had not been held to have been decided in error. In fact several district courts have cited *Gabel* with approval for the proposition that a class action may be maintained in appropriate mass accident cases. *Hernandez* v. *Motor Vessel Skyward,* 61 F.R.D. 558, 560 (S.D.Fla. 1973), aff'd on other grounds, 507 F.2d 1278 (5th Cir. 1975), *Harrigan* v. *United States,* 63 F.R.D. 402, 408 (E.D.Pa. 1974), *Yandle* v. *PPG Industries, Inc.,* 65 F.R.D. 566, 569 (E.D.Tex. 1974).

In this posture we respectfully submit that *Gabel* not only fails to demonstrate that Judge Hall was guilty of "repeated errors" in the application of Rule 23, but to the contrary that his application of Rule 23 to aviation mass disaster cases, in fact, was never rejected by any panel or the Court *en banc* in the Ninth Circuit. Furthermore, when the *Gabel* class action order was entered in February, 1972 no prior decision of the Court of Appeals below presented facts or issues comparable to those in *Gabel* and *Flanagan. LaMar* v. *H & B Novelty & Loan Co.,* 489 F.2d 461 (9th Cir. 1973), heavily relied upon by the court below, not only post-dates *Gabel,* but is so distinguishable on its facts as to be inapposite.

The January 13, 1976 status of the docket of the court below makes it clear that *Flanagan,* therefore, not *Gabel* constitutes the first formal appellate review in the Ninth

Circuit of the applicability of Rule 23 to an aviation mass disaster case. In the only other previous consideration of that issue of which we are aware *Stoddard* v. *Ling Temco Vought,* Civ. No. 72-1294 ALS (C.D.Ca. 1973), a petition for a writ of mandamus to vacate a class action determination was denied.

The parties in both *Gabel* and *Flanagan* are entitled to have their class action issues decided independently on their own records. Appellate review of *Gabel* may well result in a ruling that the class action determination therein was proper. The prerogatives of the panel of appellate judges which will hear *Gabel* should not be undermined by those who heard *Flanagan.* Nor should the Petitioner herein suffer comparison to parties, facts and issues as yet unsettled.

CONCLUSION

For these further reasons a Writ of Certiorari should issue to review the writ of mandamus and opinion of the Ninth Circuit.

Respectfully submitted,

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February 3, 1976